

**FILED**

**NOT FOR PUBLICATION**

**AUG 29 2006**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CECILIO CORTEZ LOPEZ,

Defendant - Appellant.

No. 05-35387

D.C. Nos. CV-04-06296-MRH  
CR-01-60021-MRH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Oregon  
Michael R. Hogan, District Judge, Presiding

Submitted August 21, 2006<sup>\*\*</sup>

Before: GOODWIN, REINHARDT, and BEA, Circuit Judges.

Cecilio Cortez Lopez appeals pro se from the district court's judgment denying his 28 U.S.C. § 2255 motion alleging ineffective assistance of counsel.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo, *see United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003), and we affirm.

Lopez contends that his counsel failed to argue and object during the plea negotiations and sentencing that his prior conviction for transporting or attempting to transport heroin was a misdemeanor instead of a felony. This failure resulted in an enhancement of his sentence under 21 U.S.C. § 841(b)(1)(A)(viii). To demonstrate ineffective assistance of counsel, Lopez must establish both that his counsel's performance was deficient and that he was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Lopez fails to show that his counsel's performance was deficient because upon review of the record, we conclude that his prior felony conviction was not a misdemeanor.

**AFFIRMED.**